Supreme Court, U.S.
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No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

JOINT APPENDIX

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Petition For Certiorari Filed April 11, 1991
Certiorari Granted June 10, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 25, 1991 – Petitioner arrested and original delinquency petition filed in Ramsey County (Minnesota) Juvenile Court

June 26, 1990 – Petitioner denied both counts of delinquency petition and was remanded to custody

July 4, 1990 – Notice of Motion and Motion to Amend Petition filed in Ramsey County Juvenile Court

July 13, 1990 – Hearing held on petitioner's motion to dismiss Count II of Amended Delinquency Petition

July 16, 1990 – Order entered finding city ordinance unconstitutional

July 20, 1990 – Notice of Appeal to Court of Appeals and Statement of the Case of Petitioner-Appellant filed

July 27, 1990 – Petition for Accelerated Review filed in Minnesota Supreme Court

August 3, 1990 – Petition for Accelerated Review granted

December 4, 1990 – Oral argument before the Minnesota Supreme Court

January 18, 1991 – Opinion of the Minnesota Supreme Court entered

February 27, 1991 – Judgment of Minnesota Supreme Court entered

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State of Minnesota
Second Judicial District
Form JC-24 10-88

DELINQUENCY PETITION
to
RAMSEY COUNTY JUVENILE COURT

In the Matter of the Welfare of R.A.V.

R. A. V. 3/13/73

(first) (middle) (last) (date of birth)

Child's parents, guardian, spouse or nearest relative, noting their relationship and addresses are as follows:

* * *

A. The specific statutory reference for the law(s) alleged to be violated by the child is (are) as follows:

COUNT 1: ASSAULT IN THE FOURTH DEGREE, Minn. Stat. § 609.2231, Subd. 4; 609.17

COUNT II: ASSAULT, St. Paul City Ordinance Sect. 292.01; 609.17

B. The alleged offense(s), if committed by an adult would be considered:

___ a Felony
XX a Non-Felony
___ not applicable

C. Petitioner, being duly sworn, states to the Court and swears to the best of his/her knowledge and belief that said child has committed the following described offenses and that the attached reports or exhibits, consisting of 39 pages, are true and correct and establish probable cause for said belief:

COUNT I

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did wrongfully and unlawfully assault Russell Jones, because of the actual or perceived race of Russell Jones, such action constituting ASSAULT IN THE FOURTH DEGREE, contrary to Minn. Stat. § 609.2231, Subd. 4; 609.17.

COUNT II

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did intentionally or with reckless disregard of so doing, put another, Russell Jones, in fear of immediate bodily harm or death, by placing on public or private property a symbol, to-wit: a burning cross, which is reasonably understood as communicating threats of harm, violence, contempt, or hatred on the basis of race, such action constituting ASSAULT, contrary to St. Paul City Ordinance Section 292.01; 609.17.

WHEREFORE, Petitioner requests that said child be brought before the Juvenile Court to be dealt with according to law.

Subscribed and sworn to before me on

6/25/90 /s/ Lynn M. Dexter
Date Notary Public

/s/ Anne E. Hyland
ANNE E. HYLAND Petitioner

This petition has been drafted under my supervision and I believe that reasonable grounds exist to support the allegations.

/s/ Anne E. Hyland — 6/25/90
Ramsey County Attorney — Date

File No.: 09-D-1231
Date of Hearing:
June 26, 1990

FINDINGS and/or ORDER
Ramsey County Juvenile Court

#11 C8-90-1656
STATE OF MINNESOTA
Second Judicial District

Form JC-36 3-89

IN THE MATTER OF THE WELFARE OF: R.A.V.
TYPE OF HEARING: Violation

Appearances: X Child; X Mother; _ Father

Defense Attorney: Cleary

P.O./S.W.: Petersen

County Attorney: Flint

Other: Evanson

Upon due consideration of the petition(s), the statements made at said hearing, the files and records herein and the reports (if any) submitted to the Court, the Court makes the following FINDINGS OF FACTS and ORDER:

1. This matter comes before the Court pursuant to the petition(s)

	dated	filed by
A)	6-22-90	Joel Hanson
B)	6-25-90	Anne E. Hyland

2. The offense(s) occurred before said child became 18 years of age.

3. X The child

X denied A) Probation Violation

B) 1) Assault 2) Assault

4. _ Counts dismissed _____

5. X There is reason to believe that the child would not remain in the care and control of the person to whose lawful custody that the child would be released.

ORDER

1. This matter is continued to Tuesday, July 17, 1990 – 8:30 – J. Flinn

2. ___ This child is adjudicated _____

3. ___ An adjudication of delinquency is withheld pending disposition.

4. ___ This matter is referred to the Ramsey County Community Corrections Department for an ___ investigation; ___ updated report; ___ supervision by department; ___ staffing.

5. ___ This matter is referred to the Ramsey County Community Human Services Department for an ___ investigation; ___ updated report; ___ supervision by department ___ temporary legal custody ___ staffing.

6. Petty Offender Program ___; PCIP ___.

7. Psych. eval. ___; C.D. eval. ___; detention X; home detention ___; shelter ___.

8. ___ The costs of care a charge upon the funds of the Ramsey County Community Human Services Department.

9. ___ That restitution be determined. CSR hours _____; amount of fine _____

10. ___ The child shall have no contact with _____

11. ___ That the warrant issued for the child's apprehension be quashed and returned to the Juvenile Court Administrator.

12. X (Other) A) Motion to Dismiss Assault 4 denied.

B) Motion to Dismiss Assault (ord.) denied.

C) Detn findings: 1) not likely to remain in care/custody (p.c. run from BTT); 2) danger to others/self (p.c. Assault – 2 cts).

FINDINGS OF FACT AND ORDER RECOMMENDED:

/s/ Donna Tretheway
Referee, Juvenile Court

FINDINGS OF FACT AND ORDER CONFIRMED:

/s/ Charles A. Flinn Jr.
Judge, Juvenile Court

#9 C8-90-1656

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

JUVENILE COURT DIVISION
Court File No. 89-D-1231

In the Matter of the Welfare of:

R.A.V.

NOTICE OF MOTION AND MOTION TO AMEND PETITION

TO: Respondent and his attorney, Ed Cleary

PLEASE TAKE NOTICE that at the time and place set for trial of this matter, the State will move the Court, pursuant to Rule 19.05 of the Minnesota Rules for Juvenile Courts, for leave to amend the petition to read per the attached petition.

This Motion is scheduled for the convenience of counsel and may be advanced upon notice to the Clerk of Juvenile Court and the State at least three (3) days before the motion is scheduled to be heard by the Court.

DATED: July 4, 1990

/s/ Leslie Norsted

Leslie Norsted
J. Lindsay Flint
Assistant Ramsey
County Attorneys
350 St. Peter Street, Suite 540
St. Paul, Minnesota 55102
[612] 292-6724

I CERTIFY THAT ON 7-5-90 I SERVED A COPY OF THE ATTACHED DOCUMENT(S) ON DEFENSE ATTORNEY BY PLACING SAME IN AN ENVELOPE AND DEPOSITING IN THE U. S. MAILS AT ST. PAUL, MINNESOTA

C. Brewster

State of Minnesota
Second Judicial District
Form JC-24 10-88

AMENDED
DELINQUENCY PETITION
to
RAMSEY COUNTY JUVENILE COURT

In the Matter of the Welfare of R.A.V.

R.	A.	V.	3/13/73
(first)	(middle)	(last)	(date of birth)

Child's parents, guardian, spouse or nearest relative, noting their relationship and addresses are as follows:

* * * *

Intake and Court Use Only:

Court File No. 89-D-1231

Date Initial Appr. Trial 7-17-90

___ Active ___ Non-Active

Probation Office _____

Intake Case No. _____

Date Filed Intake _____

S.J.I.S. # _____

A. The specific statutory reference for the law(s) alleged to be violated by the child is (are) as follows:

CT. I: ASSAULT IN THE FOURTH DEGREE, Minn. Stat. § 609.2231, Subd. 4; and 609.05

CT. II: DISORDERLY CONDUCT, St. Paul City Ordinance Sect. 292.02; 609.05.

B. The alleged offense(s), if committed by an adult would be considered:

___ a Felony
XX a Non-Felony
___ not applicable

C. Petitioner, being duly sworn, states to the Court and swears to the best of his/her knowledge and belief that said child has committed the following described offenses and that the attached reports or exhibits, consisting of 39 pages, are true and correct and establish probable cause for said belief:

COUNT I

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did wrongfully and unlawfully assault Russell Jones, because of the actual or perceived race of Russell Jones, such action constituting ASSAULT IN THE FOURTH DEGREE, contrary to Minn. Stat. § 609.2231, Subd. 4; 609.05.

COUNT II

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did, on the basis of race or color, place on private property, to-wit: 290 Earl Street in St. Paul, a symbol or object, to-wit: a burning cross, and R.A.V. knew or had reasonable grounds to know such action would arouse anger, alarm or resentment in others, such action constituting DISORDERLY CONDUCT, contrary to St. Paul City Ordinance Section 292.02; 609.05.

WHEREFORE, Petitioner requests that said child be brought before the Juvenile Court to be dealt with according to law.

Subscribed and sworn to before me on

7/5/90
Date

/s/ Colleen K. Brewster
Notary Public

/s/ Leslie Norsted
Leslie Norsted,
Petitioner

This petition has been drafted under my supervision and I believe that reasonable grounds exist to support the allegations.

/s/ Anne Hyland 7/5/90
Ramsey County Attorney Date

---

[1] STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
JUVENILE COURT DIVISION

FILE NO. 89-D-1231

In the Matter of the Welfare of: CONSTITUTIONALITY HEARING
R.A.V.

The above-entitled matter came on for trial before the Honorable Charles A. Flinn, Jr., one of the judges of the above-named court, in the Juvenile Center of Ramsey County District Court, in the City of Saint Paul and State of Minnesota, commencing on July 13, 1990.

A P P E A R A N C E S

Leslie Norsted and J. Lindsay Flint, Assistant County Attorneys, appeared on behalf of the State of Minnesota.

Edward Cleary, Assistant Public Defender, appeared on behalf of the defendant R.A.V. who was also present.

[2] THE COURT: This is in the matter of the welfare of R.A.V. who is present here with his attorney Mr. Ed Cleary. I have read – Ms. Flint is here with Ms. Norsted on behalf of the County Attorney's Office, and both sides have submitted to me very brief memoranda and copies of cases they deem applicable in this case a couple of days ago. Now, based upon a review of that material yesterday, while it was reasonably detailed, it was not exhaustive just because of the nature of the press

of time. We have been in this case less than a week and it was agreed a week ago that they would submit cases to me by Wednesday and I would read them. We have oral arguments today and I will make a decision by Monday. But I will say this just so that everybody knows where they're headed. It occurred to me after reading this stuff that there clearly is the line of disorderly conduct cases that the state cites that are upheld routinely, it seems, and especially if they're limited to "fighting words," and I have a terrible time in this case sort of laying those alongside the line of cases culminating in *Eichman*. *Johnson and Eichman*, I guess I should really say, the two flag burning cases, and their progeny – I never can remember the names but the Skokie cases and all of these, you know, whereby conduct along those lines has almost, not routinely, but has most frequently been held to be [3] protected by free speech, okay. They just, you know, maybe there is a way of scoring that that I don't understand. Having said that, it seems to me that this case, as I understand the facts, and the question I want to ask you, should I read some more of the facts of this case or shouldn't I? I don't know. All I know about it is it's a flag burning and I don't even know whether it's public or private property.

MS. FLINT: Cross burning.

THE COURT: Cross burning, and I don't know anything other than that, really, about it. I don't know whether it's on public or private property. I don't know anything about the people it was aimed at, if it was even aimed at someone, and maybe I don't need to know that for purposes of the constitutional argument here. But it seems to me that this ordinance has a lot of resemblances

and the case has a lot of resemblances to the flag burning line of cases which I will refer to as opposed to disorderly conduct cases, and that I am not sure this most recent submission of Mr. Cleary's deals with the overbreadth to that and I haven't really considered that. I don't know if that bothers me as much as just the fact that this, you know, as the ordinance does indeed, as the state concedes now, attempt to proscribe expressive conduct and the things that fall from that seem to be in the cases that I [4] have read anyway that makes this unreasonably shaky ground. I want to go back, and having said that, because I thought about it this afternoon, I looked at and read those two cases you cite from '81 and '89 that upheld some cross-burning activity and they kind of now slip out of my mind as to the distinction and I am going to go back and read those in more detail as to how they got around upholding those. And I don't know. So with that background, you can add anything you want. I happen to think that these memorandum and the cases are pretty, you know, they're not clear. If they were clear, we wouldn't be here. At least reasonably exhaustive and helpful and I don't know how much all of our talking and flapping our gums is going to help.

MR. CLEARY: Your Honor, on behalf of R.A.V. I would like to make argument primarily because it may be important to have a record here at a later time. I understand the court reviewed the memoranda and the cases. I think procedurally we should have a record of exactly what is going on here. Originally, R.A.V. was charged with the two count petition dated June 25. Count I was assault and a gross misdemeanor under Minnesota Statute. Count II was an ordinance assault under the Hate

Chapter Ordinance in St. Paul of 292, specifically 292.01. We had some discussion off the record in intervening days [5] after that initial petition was filed. The county attorney then amended Count II from hate crime assault to hate crime disorderly conduct, again under the ordinance. The cite now, 292.02. And a plea of not guilty if it was not actually entered should be noted for the record and the constitutionality was challenged and notified to all parties that this matter would be heard. And the court has indicated that it asks for cases and brief memorandum and today we were scheduled for brief arguments.

I would like to go through that briefly. I realize the court has already reviewed the memorandum. I gave the court a brief analysis of how I feel the matter should be reviewed based on the case law. The first analysis is whether or not there is expressive conduct involved. As the court has noted for the record, the state has conceded that matter so then we move on to the issue of is the regulation content-based. The court mentioned the Skokie case which is *Collin vs. Smith*. That is a 1978 Second Circuit case that made it quite clear constitutionally that in that case, the American Nazi Party could, in fact, march through a Jewish suburb of Chicago wherein many survivors of the Holocaust lived which might be as incendiary a situation as you are going to have. The court made it clear in that situation that regardless of the potential for bad feelings among those Skokie [6] residents, that the ordinance was unconstitutional because it attempted to regulate free expression and it wasn't content-based. It is our position that this ordinance similarly would make such a display of a swastika or other Nazi symbol illegal, which I would say is unconstitutional. But

more importantly, as the court has pointed out, the two flag burning cases, the *Texas vs. Johnson* and *U. S. vs. Eichman*, both have indicated that it is unconstitutional to prevent flag burning under those circumstances. Perhaps the best test of how overbroad this ordinance is is if one of us went outside right now and burned a flag, we would be subject to prosecution for this under this symbol that would be likely to upset someone. I would guess it would upset this court and many veterans of the armed services would be very upset, and that is the key to this entire matter is that you're always going to have symbols and objects that are going to upset a certain group of people.

Now, one of the points the prosecution made in their list of cases, which I think is very important to discuss, is that they're suggesting that the Supreme Court does not support review of a statute on its face. This gets back to what the court said a minute ago. How much do I need to know about the facts of this case? It is our position, and I believe the case law backs this, that they're right [7] insofar as the Supreme Court generally does not wish to have a matter reviewed on its face. What they're wrong about is the exception for First Amendment cases. When a party asserts his First Amendment right, that party may attack an overbroad statute even though his conduct could have been regulated by a statute drawn with the requisite narrow specificity. I would say *Dumbrowski vs. Fliester*, 380 U. S. 479. That is a 1965 case. What the court is saying there, quite simply, is that the issue here is not cross burning. You're going to find the prosecutors are going to emphasize the facts of this case but the facts of this case are not relevant at this stage of the proceeding.

They may be very relevant at a later date. In terms of this statute, it is a First Amendment challenge, so we are attacking it on its face and for purposes of analyzing this ordinance that would mean a Nazi symbol, a flag, cross burning, all kinds of things fall under this. With that analysis, it's clearly unconstitutional because it covers flags and swaztikas [sic] and other political expressions that have clearly been found to be constitutional. I would just say that as I have indicated in part 3 of my analysis that I submitted to the prosecution and to the court that since it is expressive conduct in a private or public forum according to this ordinance, the ordinance is not necessary to serve a [8] compelling state interest and it's obviously not generally drawn to achieve that end. The bottom line as I have indicated here is that this ordinance, like other laws in other states and other jurisdictions, has the same fundamental flaw that *Eichman* cites. It attempts to suppress expression out of concern for its communicative impact. That is the whole reason for the First Amendment. Congress in its wisdom after *Texas vs. Johnson* passed the Flag Protection Act of 1989 which is the *U. S. vs. Eichman* matter. And in that law they indicated that a consensus of the American people do not wish to have the flag burned. The court very clearly points out that that is true. And I would guess that a consensus of the American people don't like Nazi swaztikas [sic] and a lot of other activities that political fringe groups participate in. But that is why we have a First Amendment. And that is – that really is the basis for the constitution. It's the First Amendment and perhaps the most important one and it allows actions and activity that no one approves of. But that is not the point. We are there to protect minority

rights, and in so doing, protect all of our rights. Perhaps the best, in my opinion, after reading all these cases, analysis of what goes through a judge's mind when he has to decide this is Justice Kennedy's concurring opinion which is only one page long in the [9] *Texas vs. Johnson* case –

THE COURT: Let me find it, please.

MR. CLEARY: That is page 2548 of *Johnson*. Justice Kennedy, of course, was the fifth vote. He was making a 5-4 decision. You can read that one-page concurring opinion and you can feel the pain in this Justice having to make this decision. He doesn't want to do it, it's very clear. I am going to quote just briefly from it. The court can read it, but Justice Kennedy says, "The case before us illustrates better than most that the judicial power is often difficult in its exercise. We can not here ask another branch to share responsibility as when the argument is made that a statute is fraud or incomplete. We are presented with the clear and simple statutes to be judged against the pure command of the constitution. The outcome can be later known to none but ours. The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the constitution as we see them compel the result. And so great is our commitment to the process that except in the rare case, we do not pause to express distaste for the result. Perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases." That is precisely what we are faced [10] with here in my opinion. This whole matter is distasteful to all kinds of people, but that isn't the issue nor are the facts of the case the issue. The issue before the court is

that the state has chosen to prosecute R.A.V. under an unconstitutional ordinance that is dramatically overbroad and vague as well.

Now, to excuse the city authorities that pass this ordinance, I am sure it was passed before the flag-burning decisions. I would note that it was passed, however, after *Collins vs. Smith*, and attempts to regulate Nazi swaztikas [sic]. I believe it was unconstitutional even before the flag-burning cases but any case after *U. S. vs. Eichman* I believe the ordinance is clearly unconstitutional. And I would point out that the state's cases that refer to "fighting words" miss one important fact about fighting words. They point out that the First Amendment has its limits and they're absolutely right about that. In reviewing a Law Review article which I do not have for the court, I can cite, however, the author's name is Guard, fighting words is free speech, 58 Washington University Law Review. It's a 1980 article. And he cites the *Chaplinski* case. That is cited by the prosecution. He points out and it's cited also in *State vs. Carpenter*, a Missouri case at 736 Southwest Reporter, 408, that in regards to fighting words, the Supreme Court [11] has held that such offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause immediate violent response by a reasonable recipient. This is nowhere nearly narrowly drawn to cover that type of situation. Fighting words are not the issue here. And we would ask that the court find this ordinance unconstitutional.

THE COURT: Would you, all of you, like, and I think it might be appropriate, is to have these, I am just doing this before I forget it, your original three-page memorandum, four-page memorandum, and their one-pager, and now there are three or four page oral argument, if you will, marked and made a part of the record. I think that might be appropriate. The cases don't need to be because they're just Xerox copies and presumably whoever looks at this has those. But I think those might be helpful. You know, we are not going to have a great big detailed record but I think it might be helpful.

MR. CLEARY: I would note for the record I have no objection. Part of the reason I went into detail in my oral argument was that I received the written oral argument by the state when I walked into the courtroom today. So as long as there is a transcript of my [12] comments, I have no objection to their oral argument also being entered into the record.

THE COURT: I will have these marked as Exhibits 1, 2 and 3 and maybe we should do that now so we have it on the record.

(Petitioner's Exhibits 1 and 2 and Respondent's Exhibit 1 were marked for identification.)

THE COURT: Go ahead.

MS. FLINT: Your Honor, the court has before it basically a written copy of the contents of the state's oral argument and I will only attempt to highlight and perhaps contrast some of the statements made by the respondent. Basically, we are, the respondent is arguing that the ordinance is substantially overbroad and vague based on

the First Amendment challenge and standards. We do concede that the disorderly conduct ordinance is attempting to address expressive conduct by an actor. And that the court, however, the Supreme Court, unlike what the respondent has argued, has stated that in cases where both conduct and speech are involved, and this is a case where we're talking about expressive conduct, therefore conduct and speech, that the facial overbreadth of a statute must be both real and substantial and judged in relation to the statute's intent, its application. And in order to judge it void on its face, statutes are invalid [13] or overbreadth only when the flaw is so, of such substantial concern in context to the statute as a whole. This was stated in *Broderick vs. Oklahoma* which is a 1973 case. It was reiterated by the court in *Brockett vs. Spokane* which is again another First Amendment case and this was in 1985. The court held that it should not extend the invalidation of a statute further than is necessary. It said to the court, you are to look at this statute and apply it to the facts. You are not to facially invalidate it. And that is a First Amendment case. And that is the trend of the court in fact is to include First Amendment cases in the principle that you are to not anticipate a question of constitutional law in advance of the necessity of deciding it, or to formulate a rule of constitutional law broader than is required to the precise facts of the case before the court. Therefore, the court does not need to look at the entire statute and whether it fits this particular, or whether it is unconstitutional on its face. It is only to look at whether the statute is constitutional in the light of the facts before it, the facts before this case, and we will inform the court of that is that this was a cross burning

on private property. It occurred in the yard of the family, of a black family. It occurred at night. It occurred without the parties, whoever had done it, [14] remaining there. They were not present when it was seen by the family. It is clear that this activity was, does fit within what – what the court needs to look at here is the placing of a burning cross on private property where one knows or has reason to know that it will arouse anger, alarm or resentment in others on the basis of race, color, Creed or religion. That is all that the court needs to look at. This disorderly conduct statute, ordinance, also is very similar as the court has already noted to other Minnesota disorderly statutes and ordinances which have been held as constitutional and that is after these decisions of the Supreme Court stating that the court need not look at the entire statute on its face but only as it is applied in the particular case.

That is exactly what the Minnesota Supreme Court has done in several disorderly conduct cases, beginning with *In the Matter of the Welfare of S.L.J.* and that also follows the decision of the Supreme Court in *Chaplinski v. New Hampshire*. The question of whether this behavior is, whether the activity here of the expressive conduct fits within fighting words, the state doesn't believe there is a question about that. Fighting words were defined in *Chaplinski* as "those personally abusive epithets which when addressed to the ordinary citizen are as a matter of common knowledge inherently likely to [15] provoke violent reaction or words, or words which by their very utterance inflict injury or tend to insight immediate breach of the peace." It is not a flag burning, it is not a

political statement. It is in fact a personally abusive activity. It tends to insight an immediate breach of the peace. It inflicted injury on the parties. The respondent, you know, refers again to the flag burning case, the *Eichman* case. These were, the political, publicly burning a flag during the middle of a demonstration against the government. It was not a personal attack on a private individual on private property which is what we have here.

THE COURT: Would that – let me ask you this: would that analysis – what if he burned this cross in front of a gathering of one of the black congregations up here in the Summit-University area, they were having a church meeting, or any big crowd that might be offended by it? I would be offended by it, but this was, as you are telling me, I think, a single cross burning incident directed at least arguably against a family. The marches in Skokie, for instance, were going to be marches of a large group of people who would offend a large group of people. Does that make or break the constitutionality of this? I wouldn't think so. You are telling me that it does.

MS. FLINT: No. What I am saying is, though, that [16] the court does not need to look at that. The court needs only to look at the facts and the Supreme Court has stated you need only look at the facts before you. You do not need to look at anything beyond, is it constitutional given the ~~facts that~~ you have before you?

THE COURT: Okay.

MS. FLINT: Again, in the other cases that respondent has cited, there is an ability to escape the speech that is being given, performed, whatever, in front of them. Here, and the court has said that it is important, and, in

fact, Collin vs. Smith, the court notes there is room under the First Amendment for the government to protect targeted listeners from offensive speech when the speaker intrudes on the privacy of the home or a captive audience cannot practically avoid exposure. We submit that placing a burning cross in the fenced-in yard of a family is just such an intrusion of privacy. Regarding –

THE COURT: I hear what you are saying.

MS. FLINT: Regarding whether a burning cross represents, what it represents, what kind of expressive conduct that is, in *State vs. Kansas,* it's been upheld as a terroristic threat. The court argued that a threat is not limited to a written or oral threat that can be inferred from a physical act such as a cross burning. And the court said to look at all of the circumstances [17] surrounding the communication in order to find, in finding that act of terroristic threats, which is exactly again what the court says to look at in a disorderly conduct situation is to look at the facts surrounding it to find the fighting words. In *U. S. vs. Salyer,* the U. S. Court of Appeals sustained an upward sentence departure in a case where a cross burning had occurred. And what the court looked at were the facts surrounding that activity, and citing that the victims were particularly vulnerable to that message, that activity, that conduct. And it cited that historical connotation of violence, intimidation and terrorism which is symbolized by the burning cross.

We argue that, or we ask the court, I guess, to look at the content of the expressive conduct represented by a burning cross. It is the first step actually in an act of racial violence. And what we see it as equivalent to is the

waiving of a knife before one thrusts it. It's the pointing of a gun before it's fired. Lighting of a match before arson. And it's a hanging of the noose before the lynching. It's just the first step in the act of assault. And it's no more protected than holding a gun to a victim's head. And it's perhaps the most, the ultimate expression of fighting words. We ask the court to narrowly review the St. Paul Bias Motivated Disorderly [18] Conduct Ordinance and uphold it as a constitutional restriction on free speech under the First Amendment as unprotected fighting words.

MR. CLEARY: Your Honor, I would like a chance to briefly comment, if I may.

THE COURT: Go ahead.

MR. CLEARY: I will begin by stating I don't understand the prosecutor attempting to suggest things such as noose hanging from trees. I think that is a sign of weakness of their argument that they are going to try to smoke it up in some fashion that we are all going to be seeing nooses from trees and guns in people's heads. It seems to me from their argument one of the key questions before this court is whether one is to be biased by the particular facts of a given situation or are we examining an ordinance under the First Amendment for its constitutionality. They argue, in fact, it's a good final argument when the trial comes, but that is not the issue now. I don't have the entire case, I have the headnotes and from *Dumbrowski* which I cited earlier which states that a First Amendment challenge is not a question of analyzing the facts. On the second page at the very bottom, I have underlined a paragraph. I would like to cite that. This

was a First Amendment challenge. "By permitting determination of the invalidity of these [19] statutes without regard to the permissibility of some regulation of the facts in particular cases, we have in effect avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact that the prosecution unaffected by the prospects of its success or failures." It's not a fact determination at this stage; it's an analysis of an ordinance under the First Amendment for overbreadth and vagueness and I would just make that clear that that is our position.

THE COURT: Okay. The court will take the matter under advisement. I think you can take the defendant back.

(WHEREUPON, the proceedings were concluded.)

* * *

[1] ORIGINAL

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
JUVENILE COURT DIVISION

Juvenile Court File No. 89-D-1231

In the Matter of the Welfare of: PARTIAL TRANSCRIPT

R.A.V. OF PROCEEDINGS

The above-entitled matter came on for hearing before the Honorable Charles A. Flinn, Jr., Judge of District Court, Juvenile Court Division, on Monday, July 16th, 1990, in the Third Floor Courtroom of the Ramsey County Juvenile Service Center, 480 St. Peter Street, Saint Paul, Minnesota.

LESLIE NORSTED and J. LINDSAY FLINT, Assistant Ramsey County Attorneys, appeared on behalf of the petitioner.

EDWARD J. CLEARY, Assistant Ramsey County Public Defender, appeared on behalf of the respondent, R.A.V., who was also present in court.

Rick Peterson appeared on behalf of the Ramsey County Community Corrections Department.

The respondent, R.A.V. and his attorney, Mr. Cleary, waived the appearance of the respondent's parents at this hearing.

* * *

[2] (WHEREUPON, the following proceedings took place in open court, commencing at approximately 9:30 o'clock, a.m.:)

THE COURT: This is in the matter of the welfare of R.A.V., file number 89-D-1231.

Let's get the formal appearances, please, for purposes of the record. Mr. Peterson.

MR. PETERSON: Rick Peterson from the probation department.

MS. FLINT: Lindsay Flint, Ramsey County Attorney's Office.

MS. NORSTED: Leslie Norsted, Ramsey County Attorney's Office.

MR. CLEARY: Edward J. Cleary, Ramsey County Public Defender's Office, on behalf of R.A.V.

THE COURT: The matter is before the Court this morning on the issue of the constitutionality of the ordinance of the City of Saint Paul, Section 292.02, which is a conduct – disorderly conduct ordinance, making someone who places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion; that disorderly conduct is then a misdemeanor. That is [3] one of two charges against this respondent; the second being a gross

misdemeanor state statute, which is not an issue in this proceedings [sic].

Defendant or respondent has raised the issue of the constitutionality of this statute. Brief briefs were filed with the Court and a number of cases furnished to the Court. Oral argument was held on the 13th, Friday the 13th, 1990, and we are here this morning for decision.

And I have reviewed all of the cases several different times and although I am not going to be very eloquent here this morning, the Court feels that the ordinance is quite clearly unconstitutional and so rules.

I do that having full mind of Justice Kennedy's great agony in the JOHNSON, TEXAS versus JOHNSON decision, dealing with the flag burning, where he waxes quite eloquently about how difficult the job is to do at times when the conduct is so egregious in terms of what main stream people would normally think is proper. And I think that is the situation I find myself in here.

At least the alleged conduct here is something I in no way agree with; in fact, I find completely reprehensible. I am not saying that the respondent has or has not done that, this conduct; it is just the [4] alleged conduct is something I personally find abhorrent. But that is not what we are about and that is what Kennedy talks about.

And I have reviewed the cases cited by the State, clearly they deal with the upholding of disorderly conduct statutes, which carve out the fighting words exception for constitutionality and have done so in both state and federal cases for a number of years. The State

attempts to make the same argument here and I just don't think it stands up.

The two cases the State cites dealing with flag burning issues that were held constitutional or – just aren't constitutional cases. The first one is State versus MILLER, which is a terroristic threats case, I believe, that is the terroristic threats one, right?

MS. NORSTED: That is correct, Your Honor.

THE COURT: And whether that conduct of burning a cross could be considered to be the crime of terroristic threats. I think that's the case where they specifically say that the constitutionality of the statute is not challenged.

The second case the State cites, U.S. versus SALYER, is an enhancement of sentence case, dealing with the Federal Sentencing Guidelines and again, there is no constitutionality issue raised in or at least discussed [5] in the opinion that I could see.

Conversely, when you look at the line of cases cited, cited by the respondent here, I think they follow almost to a tee the issue that is raised by the respondent. The cases, of course, end with the two flag burning cases, TEXAS versus JOHNSON and the EICHMAN case, U.S. versus EICHMAN. But going back even to the Skokie case, COLLIN versus SMITH and BOOS versus BARRY, which is the Washington D.C. case; they all show remarkable to me at least a bright line leading to my finding this ordinance unconstitutional.

The State has conceded that there is the conduct prescribed in the ordinance constitutes expressive conduct; I think it's content based. And I can't see that the ordinance serves a compelling state interest or is so narrowly drawn to achieve an end that makes it constitutional, which would be the third leg. I believe that clearly, although the opinions may be unpopular, that the ordinance violates the right of free speech set forth in the First Amendment and, therefore, I rule it unconstitutional.

Now, what is next?

MS. NORSTED: Your Honor, the State may be appealing the Court's decision this morning, Rule 31.02 addresses appealable orders.

[6] THE COURT: Okay, let me find that please. (Judge finds rule). Yes, okay.

MS. NORSTED: The one thing I note, Your Honor, in Rule 31.02, is that the County must make an appeal related to all pretrial issues. So, in this case what we need to do is to have essentially a full pretrial conference.

We have not talked about whether Mr. Cleary intends to contest the admissibility of the respondent's statements to the police, whether he intends to contest the search of the residence in which the respondent was living at the time of the incident. There are several potential Rasmussen type issues. And so at this time I think we need to address whether those are going to be waived or raised.

MR. CLEARY: Well, in no way can I waive either one of those. There are some real questions about the statements taken. As far as the search of the house, I would have to review my file further, because I wasn't prepared for a Rasmussen hearing this morning.

MS. NORSTED: We didn't intend to go forward with a Rasmussen hearing this morning.

THE COURT: No, no. But if we are going to do that, if you are going to do some Rasmussen issues, I am reading the rule as we go along here, it appears that we [7] have to get them all out of the way. Of course, that makes sense in a way; then there is not piece-meal appeals every time we go through a Rasmussen issue.

So, if you've got some Rasmussen issues, what you need to do I think is you have to go out and frame them and we do have some time scheduled tomorrow for this case and we will do the Rasmussen.

MR. CLEARY: Okay, that is fine.

MS. NORSTED: Good.

MR. CLEARY: That will work out.

THE COURT: Will that work?

MR. CLEARY: Yes.

MS. NORSTED: That will work.

THE COURT: In any event, once we get that done, you have got what, how many, five days to decide whether you are going to appeal?

MS. NORSTED: That is right, Your Honor.

THE COURT: Well, I don't think we have any issue as to what we are going to do with the respondent, until you do decide to appeal, right?

MS. NORSTED: That's true. We could address that issue tomorrow, Your Honor.

THE COURT: That is true.

MS. NORSTED: We will definitely know tomorrow, after we are done handling the Rasmussen [8] issues, whether we intend to go forward with the trial or whether we will be filing an appeal.

THE COURT: Just for planning purposes, it is my understanding your present intention is you think you will appeal, is that right?

MS. NORSTED: That is my understanding.

THE COURT: All right. Well, in light of that, Mr. Peterson, then we have a petition pending somewhere out here?

MR. CLEARY: There is a runaway petition.

MS. NORSTED: That is right.

MR. CLEARY: But just so I'm clear, we are not going to do a trial tomorrow in either case? I mean –

THE COURT: No.

MR. CLEARY: Even if the appeal –

THE COURT: They can't, because they have got to do all – They have to take their appeal and do everything before jeopardy attaches.

MR. CLEARY: Right. I guess what I meant is if you decide not to appeal.

If they decided not to appeal and go forward on the remaining count; as I understand it, we are just having the Rasmussen tomorrow?

I mean I am not prepared – at least I want to know right now if we have to prepare for trial. And if so, I [9] think we need more time than we have tomorrow. Which means that we have to address R.A.V.'s situation if we set another trial date. It gets a little – do you understand my problem? After the Rasmussen, you say we are not appealing, technically the trial could commence.

MS. NORSTED: Right.

MR. CLEARY: So, that is my problem, is that we can't really do that, because we don't know until the last second what's going to happen. I mean –

THE COURT: Okay, stop off the record a minute and let's discuss that.

(Off-the-record discussion, followed by a short recess.)

* * *

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

IN THE MATTER OF THE WELFARE OF R.A.V.,
STATE OF MINNESOTA,
Petitioner,
vs.
R.A.V.,
Respondent.

C8-90-1656

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. 89-D-1231
Date of Order Appealed From: July 16, 1990

PLEASE TAKE NOTICE that the above-named petitioner State of Minnesota appeals to the Court of Appeals of the State of Minnesota from the order of the Honorable Charles A. Flinn, Jr., Judge of District Court, dismissing Count II of an amended delinquency petition. The order was entered on July 16, 1990.

TOM FOLEY
RAMSEY COUNTY ATTORNEY

DATED: July 20, 1990

BY: /s/ Steven C. DeCoster
Steven C. DeCoster
Assistant Ramsey County Attorney
350 St. Peter Street, Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 298-5464

OFFICE OF
APPELLATE COURTS
FILED
JUL 20 1990

STATE OF MINNESOTA
IN COURT OF APPEALS

IN RE MATTER OF THE WELFARE OF R.A.V.,
STATE OF MINNESOTA,
Petitioner,
vs.
R.A.V.,
Respondent.

C8-90-1656

STATEMENT OF THE CASE OF PETITIONER-APPELLANT

JUVENILE COURT CASE NUMBER: 89-D-1231

APPELLATE COURT CASE NUMBER:

1. **Court of case origination:**

   Ramsey County District Court, Juvenile Court Division

2. **Jurisdictional statement.**

   Appeal taken from order dismissing Count II of amended juvenile Court petition of delinquency under Minn. Stat. § 260.291 and Minn.Rules Crim.Proc. § 28.04.

3. **Type of litigation and designate any statutes at issue.**

   Petition alleging delinquency filed in the District Court, Ramsey County, Juvenile Court Division.

   Constitutionality of Ordinance § 292.02 of the City of St. Paul is at issue.

4. Brief description of claims, defenses, issues litigated and result below.

Respondent moved to dismiss Count II of an amended juvenile petition which alleged his violation of St. Paul Ordinance § 292.02 by placing on private property a burning cross "reasonably understood as communicating threats of harm, violence or hatred on the basis of race, color, creed or religion."

The trial Court ruled that the statute was substantially overbroad and vague and thereby an impermissible infringement of the right of free speech in the First Amendment to the U.S. Constitution.

5. Issues proposed to be raised on appeal.

(a) St. Paul Ordinance § 292.02 concerning bias-motivated disorderly conduct is valid on its face and as applied to respondent's conduct.

(b) The ordinance is not substantially overbroad.

(c) It is not impermissibly vague.

(d) The act proscribed is the burning of a cross on the fenced property of a black family at night which the actor knows or has reason to know will communicate threats of harm, violence or hatred on the basis of race, color, creed or religion. This constitutes that type of "fighting words" which may be punished without constitutional violation.

6. Is transcript required? Yes **If so, full or partial transcript?**

Transcript of arguments of counsel on July 13, 1990 and Court's decision on July 16, 1990 are required and have been ordered. There is no need for a transcript of the Rasmussen Hearing on July 17, 1990.

7. Is oral argument requested? Yes. **If so, is argument requested at a location other than that provided in Rule 134.09, Subd. 2?** No.

8. Are formal briefs necessary?

Yes.

9. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

For Respondent:

Edward Cleary, Esq.
409 Midwest Federal
Building
St. Paul, MN 55101
(612) 224-3781

Dated: July 20, 1990

For Petitioner-Appellant:

TOM FOLEY
RAMSEY COUNTY
ATTORNEY

/s/ Steven C. DeCoster
By: Steven C. DeCoster
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Atty. Reg. No. 21787

C8-90-1656

STATE OF MINNESOTA

IN SUPREME COURT

IN RE MATTER OF THE WELFARE OF R.A.V.	**PETITION FOR ACCELERATED REVIEW**
STATE OF MINNESOTA, Petitioner,	**Appellate Court Case No. C8-90-1656**
vs.	
R.A.V., Respondent.	

TO: The Supreme Court of the State of Minnesota

Petitioner State of Minnesota requests accelerated review by the Supreme Court of the above-entitled matter upon the following grounds:

1. Status of Appeal

Notice of Appeal filed in the Court of Appeals and docketed on July 20, 1990 from order dismissing a petition alleging delinquency filed in the District Court, Ramsey County, Juvenile Division on grounds the St. Paul ordinance proscribing bias-motivated disorderly conduct as applied violated the First Amendment to the United States Constitution.

2. Statement of Facts

The act of delinquency alleged constituted the placement of a burning cross by respondent on private

property in the fenced-in yard of a black family where the respondent knew or had reason to know the act would arouse anger, alarm, or cause resentment of the black family on the basis of race or color.

3. Statement of Legal Issues to be Raised

(a) St. Paul Ordinance § 292.02 concerning bias-motivated disorderly conduct is valid on its face and as applied to respondent's conduct.

(b) The ordinance is not substantially over-broad.

(c) It is not impermissibly vague.

(d) The act proscribed is the burning of a cross on the fenced property of a black family at night which the actor knows or has reason to know will communicate threats of harm, violence or hatred on the basis of race, color, creed or religion. This constitutes that type of "fighting words" which may be punished without constitutional violation.

4. Arguments

(a) The questions, implicating as they do sensitive issues under the First Amendment to the United States Constitution, are important ones upon which the Supreme Court should rule;

(b) The trial Court has ruled against the constitutionality of a St. Paul ordinance;

(c) The resolution of the questions presented has possible impact, statewide and beyond;

(d) The trial Court's ruling is in conflict with decisions of the United States Supreme Court and this Court in the area of terroristic threats and fighting words.

For these reasons, the petitioner requests an order granting accelerated review of this appeal now pending in the Court of Appeals.

Respectfully submitted,

HUBERT H. HUMPHREY, III.
Minnesota Attorney General

TOM FOLEY
Ramsey County Attorney

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Attorneys for Respondent
Atty. reg. No. 21787

Dated: July 27, 1990

STATE OF MINNESOTA
IN SUPREME COURT
C8-90-1656

In the Matter of the Welfare of:

R.A.V.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for accelerated review be, and the same is, granted. All briefs shall be filed with this court within the original time limitations provided by the Minnesota Rules of Civil Appellate Procedure. The matter will be placed on the calendar for oral argument before the court sitting en banc on a date to be later determined.

Dated: August 3, 1990

BY THE COURT:

/s/ Glenn E. Kelley
Associate Justice

STATE OF MINNESOTA

IN THE SUPREME COURT

C8-90-1656

Ramsey County — **Tomljanovich, J.**
Took No Part, Gardebring, J.

In the Matter of the Welfare
of R.A.V.

Filed: January 18, 1991
Office of Appellate Courts

SYLLABUS

St. Paul, Minn. Leg. Code § 292.02 (1990) prohibiting bias-motivated disorderly conduct is not substantially overbroad because it can be narrowly interpreted to prohibit only expressive conduct that falls outside first amendment protection.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

Tomljanovich, J.

The City of St. Paul alleges that between 1:00 a.m. and 3:00 a.m. on June 21, 1990, R.A.V. participated in burning a cross inside the fenced yard of an African American family's home. In connection with this incident, the City charged R.A.V. with violating St. Paul, Minn. Leg. Code § 292.02 (1990), which provides that

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. The trial court, however, dismissed the charge prior to trial on the ground that the ordinance censors expressive conduct in violation of the first amendment to the United States Constitution. The City now appeals that decision, contending that the ordinance can be narrowly construed to reach only conduct that falls outside first amendment protection. In order to prevail, the City must demonstrate "clearly and unequivocally, first, that the trial court erred in its judgment and, second, that unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Joon Kyu Kim*, 398 N.W.2d 544, 547 (Minn. 1987) (citing *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977)).

Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

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[1] *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of

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R.A.V. does not dispute that the City may prosecute individuals who engage in such actions as he is alleged to have perpetrated. Rather, he challenges the particular ordinance under which he was charged on the ground that it is substantially overbroad. In essence, R.A.V. contends that the St. Paul bias-motivated disorderly conduct ordinance potentially censors so many constitutionally protected activities on its face that it must be completely invalidated. We disagree.

The overbreadth doctrine, an exception to standing requirements peculiar to disputes regarding the extent to which the first amendment protects speech and other expressive conduct, permits an individual to facially challenge a provision even though that individual engaged in conduct that is itself subject to prosecution. *See State v. Krawsky*, 426 N.W.2d 875, 876 (Minn. 1988); *see also New York v. Ferber*, 458 U.S. 747, 768-69 (1982). The exception to the general rules of standing is intended to overcome the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also Dombroski v. Pfister*, 380 U.S. 479, 487 (1965). Thus,

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> certain groups. The swastika, the Klan robes, the burning cross are examples of signs – like all signs– that have no meaning of their own, but that convey a powerful message to both the user and the recipient of the sign in context.

Id. (footnotes omitted).

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* at 503-04 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

While the overbreadth doctrine is clearly essential to the protection of free expression, the complete invalidation of legislatively adopted laws it permits is "strong medicine" that this court does not hastily prescribe. *See Broadrick v. Oklahoma*, 413 U.S. at 613. Where the overbreadth of the challenged law is both "real" and "substantial," *see New York v. Ferber*, 458 U.S. at 770, and where "the words of the [law] simply leave no room for a narrowing construction," *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987), "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," *Secretary of State of Md. v. Joseph H. Munson Co.* 467 U.S. 947, 968 (1984), this court will completely invalidate it. When possible, however, this court narrowly construes a law subject to facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression. *See*

In re S.L.J., 263 N.W.2d 412, 419 (Minn. 1978) (disorderly conduct statute limited to "fighting words" to preserve constitutionality); *New York v. Ferber*, 458 U.S. at 769 n. 24 ("If the invalid reach of the law is cured [by narrow judicial construction,] there is no longer reason for proscribing the statute's application to unprotected conduct." *Id.*); *Lewis v. City of New Orleans*, 415 U.S. 130 (1973) (invalidating state statute where state supreme court did not narrow construction on previous remand). We conclude that the ordinance in question can be narrowly interpreted to reach only unprotected conduct, thereby sufficiently decreasing the possibility that those who wish to engage in protected expressive conduct will be dissuaded from doing so by the potential of prosecution and sparing that ordinance from the complete invalidation R.A.V. requests.

Although the United States Supreme Court's recent decision in *Texas v. Johnson*, ___ U.S. ___, 109 S. Ct. 2533 (1989) did not directly address an overbreadth challenge,[2] that decision is instructive as to the scope of constitutionally protected expressive conduct. In *Johnson*, the Court held that Texas could not prosecute an individual for burning a United States flag outside Dallas City Hall under the state's "desecration of venerated objects" statute. *See id.* at 2548. The Court noted that the state had *not* alleged that Johnson's conduct actually disturbed the

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[2] The Court avoided Johnson's claim that the statute was substantially overbroad by concluding that his particular conduct – burning a flag without threatening public safety or order – was itself protected expression and that his conviction was thus unconstitutional. *See Texas v. Johnson*, 109 S. Ct. at 2538 n. 3.

peace or that it threatened to immediately do so. *Id.* at 2541, 2548. Rather, the state contended that *every* flag burning necessarily possessed the potential to disrupt public safety and order, which empowered it to censor all such conduct. *Id.* at 2542. In rejecting this argument, the Court stated that the first amendment does not permit "the Government to *assume* that *every* expression of a provocative idea will incite a riot, but [instead requires] careful consideration of the *actual circumstances* surrounding such expression." *Id.* (emphasis added). Although in prosecuting Johnson, the state made such an impermissible assumption, the Court clearly indicated that its decision reversing Johnson's conviction did not alter or undermine the states' authority to prohibit expressive conduct likely to provoke imminent lawless action, *id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)), or constituting "fighting words," *id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)) – "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572.

Unlike the flag desecration statute at issue in *Texas v. Johnson*, the challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias. In *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), this court narrowly construed Minn. Stat. § 609.72, subd. 1(3) (1990), which prohibits "offensive, obscene, or abusive language or * * * boisterous and noisy conduct tending

reasonably to arouse *alarm, anger, or resentment in others,"* (emphasis added) to refer only to "fighting words," *S.L.J.*, 263 N.W.2d at 419, thereby preserving it in the face of an overbreadth attack. Similarly limited to expressive conduct that amounts to "fighting words" – conduct that itself inflicts injury or tends to incite immediate violence, *see Chaplinsky v. New Hampshire*, 315 U.S. at 572 – the ordinance in question withstands constitutional challenge.

St. Paul's bias-motivated disorderly conduct ordinance is also constitutional to the extent it prohibits conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447 (footnote omitted). Where the "anger, alarm or resentment" the ordinance speaks of rises to the level of "imminent lawless action," *id.* at 449, the City is permitted to intervene and censor the provocative conduct. *See Texas v. Johnson*, 109 S.Ct. at 2542. Because the City's disorderly conduct ordinance is reasonably subject to an interpretation limiting its scope to such conduct as *Brandenburg* places outside first amendment protection, we conclude that it is not substantially overbroad.[3]

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[3] The St. Paul ordinance is significantly different from the provision the United States Supreme Court invalidated in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). That provision banned all "First Amendment activities" from the central terminal area of Los Angeles International Airport. *Id.* at 571. The Court concluded the provision could not be preserved because its language "simply [left] no room for a narrowing construction." *Id.* at 575. *See also Secretary of*

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In upholding the challenged ordinance against R.A.V.'s constitutional attack, we do not take lightly the first amendment issues that his attack raises. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S. Ct. at 2544. "Resort to epithets or personal abuse," however, "is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). Although the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), and therefore is not prohibited by the first amendment.

We therefore reverse the trial court's pretrial order declaring the City of St. Paul's bias-motivated disorderly

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State of Md. v. Joseph H. Munson Co., 467 U.S. at 965-67 (statute limiting expenses of all charitable fund raising operations not subject to limiting construction); *cf. CSC v. Letter Carriers*, 413 U.S. 548, 580-81 (1973) (invalidation improper where statute "covers a whole range of easily identifiable and constitutionally proscribable * * * conduct").

conduct ordinance unconstitutional. Count two of the amended juvenile petition charging R.A.V. with violating that ordinance is reinstated and the case is remanded for trial.

STATE OF MINNESOTA

[X] Supreme Court
[ ] Court Of Appeals

In the Matter of the Welfare of R.A.V.

JUDGMENT

C8-90-1656

Appellate Court Case Number

89D1231

Trial Court Case Number

Pursuant to and order of Court heretofore duly made and entered in this cause it is determined and adjudged that the reversed of the Court below, herein appealed from, to wit, of the District Court within and for the County of Ramsey be and the same hereby is reversed in accordance with the opinion and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT 2-27-91
Dated

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: /s/ K. Erdmann
Assistant Clerk

Supreme Court of the United States

No. 90-7675

R. A. V.,

Petitioner

v.

City of St. Paul, Minnesota

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Minnesota.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 10, 1991